89-427

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *et al.*,
Petitioners,

v.

THE LONG ISLAND RAILROAD COMPANY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

The court of appeals ruled that the Railway Labor Act (RLA) overrides the Norris-LaGuardia Act and grants the federal courts the authority to enjoin sympathetic refusals to cross a picket line set up by employees engaged in a lawful primary strike where the applicable collective bargaining agreement is reasonably susceptible to being read to ban such sympathy strikes. The questions presented are:

(1) Whether, in the industries governed by the RLA, the federal courts have, in particular, the authority to enter status quo injunctions, pending arbitration, against sympathy strikes alleged to be in breach of the applicable collective bargaining agreement.

(2) Whether the federal courts have, in general, the authority to enter-status quo injunctions, pending arbitration, against actions alleged to be in breach of an RLA collective bargaining agreement.

(3) If the foregoing questions are answered in the affirmative, whether an employer seeking an injunction against sympathetic refusals to cross a picket line set up by employees engaged in a lawful RLA strike must make a showing (a) that the applicable collective bargaining agreement constitutes a clear and unmistakable waiver of the right to engage in sympathy strikes and (b) that a consideration of all the equities—including those of the employees engaged in the lawful primary strike—requires the issuance of an injunction.

LIST OF PARTIES

A complete list of the parties in the proceedings below is set out in Appendix G. App. 96a-102a.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners International Association of Machinists and Aerospace Workers, *et al.*, pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit entered in *Long Island Railroad Co. et al. v. International Association of Machinists et al.*, 874 F.2d 901 (2d Cir. Nos. 1093, 1104-1106) on April 10, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 874 F.2d 901 and is printed as Appendix A hereto. App. 1a-31a. The opinion and order of the United States District Court for the Southern District of New York, reported at 709 F. Supp. 376, and the district court's preliminary injunction

orders, which are unreported, are printed as Appendix B hereto. App. 32a-76a.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1989. App. 90a. That court denied a timely petition for rehearing on May 16, 1989. App. 91a. On August 2, 1989, Justice Marshall signed an order extending the time for filing a petition for writ of certiorari to and including September 13, 1989. App. 92a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 1 of the Norris-LaGuardia Act provides:

> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

29 U.S.C. § 101.

Section 4 of the Norris-LaGuardia Act provides in part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . .
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
>
> (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
>
> (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

29 U.S.C. § 104 (a), (e), (f), (g), (h), (i).

Section 2, First of the Railway Labor Act provides:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152, First.

STATEMENT OF THE CASE

At 12:01 a.m. on Saturday, March 4, 1989, employees of Eastern Air Lines ("Eastern") represented by the International Association of Machinists and Aerospace Workers ("IAM") began a lawful strike against Eastern. The Eastern strikers' plan, as they publicly stated, App. 16a, rested heavily on the full-fledged use of the economic weapon of secondary picketing appealing to other organized employees and seeking the latter's aid through sympathy strikes. *See Burlington Northern v. Maintenance Employes*, 481 U.S. 429 (1987) (upholding the legality of such picketing).

On the day the Eastern strike began—and before any picket lines were established—respondents The Long Island Railroad Company, Metro-North Commuter Rail-

road Company, and NJ Transit Rail Operations, Inc. moved in the district court for temporary restraining orders barring petitioner unions and union officers from honoring any IAM picket lines established at their facilities. The railroads argued that despite the absence of "no strike" clauses in the relevant collective bargaining agreements, those agreements "assume" a regular and on-going working relationship which, taken together with the purposes of the Railway Labor Act, 45 U.S.C. §§ 151-88 ("RLA"), and the obligations of RLA § 2, First, 45 U.S.C. § 152, First, would bar the threatened sympathy strikes. *See* App. 53a.

On Sunday, March 5, 1989, such temporary restraining orders were issued. The National Railroad Passenger Corporation obtained a similar temporary restraining order the next day. On March 13, 1989, the district court granted the railroads' motions for preliminary injunctions. App. 18a. The formal preliminary injunctions were issued on March 17, 1989, and filed on March 20, 1989. App. 18a. The court of appeals then affirmed the district court orders, holding that while the lower courts are divided on the issue, "the unions here may not engage in a sympathy strike without first exhausting the applicable RLA procedures." App. 24a.

REASONS FOR GRANTING THE WRIT

This case raises a complex, sensitive and emotion-charged issue that has haunted American labor law throughout this century: whether the federal courts' equity powers should be directed against concerted refusals to work by employees that do not arise out of a dispute with their immediate employer but out of a refusal to cross a picket line set up by another group of organized employees in the latter's effort to obtain a new collective bargaining agreement.

This issue goes to the heart of a labor relations system which does not provide for governmental resolution

of intractable collective bargaining disputes but for a resolution achieved by permitting the " 'full range of whatever peaceful economic power [the parties] can muster.' " *TWA v. IFFA*, 109 S.Ct. 1225, 1235 (1989) (quoting *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 392 (1969) (*"Jacksonville Terminal Co."*)). Particularly where the primary employer exercises his self-help right to operate in the face of a strike, *see TWA v. IFFA*, 109 S.Ct. at 1235, the strikers' self-help right to secure the aid and assistance of other organized employees in the form of sympathetic refusal to work becomes the critical factor in determining the outcome. Injunctive orders against such sympathy strikes thus decisively tip the balance in favor of the primary employer and in that way undermine not only the fairness of the Railway Labor Act system for settling collective bargaining disputes but also its effectiveness. *See Burlington Northern v. Maintenance Employes*, 481 U.S. 429, 451-52 (1987) ("the availability of such self-help measures as secondary picketing may increase the effectiveness of the RLA in settling major disputes by creating an incentive for the parties to settle prior to exhaustion of the statutory procedures").

The court of appeals held, in essence, that where the Railway Labor Act applies, sympathy strikes are to be enjoined whenever the pertinent collective bargaining agreement is "susceptible to being read" as a ban on such strikes. App. 25a-26a. That court made it plain, moreover, that even where, as here, "none of the pertinent collective bargaining agreements contained 'no strike' clauses or provisions expressly permitting or prohibiting the honoring of picket lines," App. 18a, but only " 'a variety of affirmative obligations of the employer and the union employees involved, which *assume* a regular ongoing working relationship' ", App. 25a (emphasis added), the agreements are susceptible to such a reading.[1] Given

[1] The court of appeals noted that of the approximately 80 collective bargaining agreements at issue only two may be read to

the nature of RLA collective bargaining agreements, of which the agreements here are a fair sample, the decision below is, in everything but name, an across-the-board proscription of sympathy strikes in the railroad and airline industries.

Under *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) and its progeny, labor injunctions against secondary activity generally and sympathy strikes in particular were routinely available.[2] Such injunctions issued without regard to the comparative equities of the primary employer and the primary employees and without any recognition of the reality that an "injunction does not settle a dispute—it simply disables one of the parties," *Burlington Northern*, 481 U.S. at 451.

The 1932 Norris-LaGuardia Act was, of course, Congress' direct response to *Duplex Printing*. *See Burlington Northern*, 481 U.S. at 438. Congress' purpose there was to "disapprov[e] . . . these free-wheeling judicial exercises," *Jacksonville Terminal Co.*, 394 U.S. at 382-83, and to bring the era of government by labor injunction to an end. "[T]he railroads were to be treated no differently from other industries in this regard." *Burlington Northern*, 481 U.S. at 440.

Very simply stated, the decision below, both in result and reasoning, is a return to the *Duplex Printing* regime. That decision, just as effectively as its predecessor, all but assures that employers faced with a sympathy strike will be able to put the federal courts' equity powers on

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contain a "no strike" clause, but added that "this does not materially alter the overall situation." App. 18a n.2.

[2] "In *Duplex*, the employees' primary dispute was with a manufacturer of printing presses in Battle Creek, Michigan. Because a strike by only the employees of the manufacturer was unlikely to succeed, the international union representing the employees expanded the strike to those employees who transported, installed and served the presses. The Court held that Congress did not intend § 20 [of the Clayton Act] to protect such an expansion." *Burlington Northern*, 481 U.S. at 438.

their side. That decision, like its predecessor, finds sanction for its result in a Congressional enactment—here the Railway Labor Act, there § 20 of the Clayton Act—through a process that can only be characterized as "statutory misconstruction". *Jacksonville Terminal Co.*, 394 U.S. at 382. And the decision below, like its predecessor, rests on a "general intuition about the political and economic significance of secondary picketing," *Burlington Northern*, 481 U.S. at 438: the intuition that secondary activity is intolerable as a threat of " 'general class war' ", *id.* (quoting *Duplex Printing*, 254 U.S. at 472).

Having shown that much, we believe we have shown enough to warrant—indeed, to mandate—the granting of this *certiorari* petition. The right to seek—and to *obtain* —the assistance of other organized employees is a potent self-help weapon in the arsenal of employees engaged in a collective bargaining dispute with their employer. The question whether the Railway Labor Act authorizes the issuance of federal court injunctions that neutralize that weapon—and by so doing greatly increase the power of management and diminish the power of labor—is thus a question of the first magnitude. That question is an open one in this Court. It is therefore patent that this Court —and not a court of appeals—should provide the answer. And that is not the whole of the matter.

As the court below acknowledged, there is a circuit conflict on whether the federal courts have authority to enjoin Railway Labor Act sympathy strikes.

The court below, moreover, premised its theory that the courts can, in particular, enjoin RLA sympathy strikes alleged to be in breach of contract on the broader theory that the federal courts can, in general, issue a status quo injunction in any RLA "minor dispute," *i.e.*, any dispute concerning an action taken by management or by labor that is alleged to constitute a breach of a governing collective bargaining agreement. On this proposition, as on its corollary, the court of appeals law is in

disarray. The First and D.C. Circuits take the view that the federal courts have no authority to issue RLA minor dispute status quo injunctions. The Second, Fifth and Eighth Circuits, by contrast, take the view that the courts have such authority where the alleged contract breach threatens irreparable injury.

Of at least equal importance, the decision below leaves this Court's *Burlington Northern* decision a "derelict on the waters of the law," *Lambert v. California*, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting). Just over two years ago, this Court *unanimously* held: "In the Norris-LaGuardia Act, Congress divested federal courts of the power to enjoin secondary picketing in railway labor disputes." 481 U.S. at 453. Nonetheless the court of appeals, while noting that " 'without the expectation that picket lines would be honored, picketing is of little practical effect' ", App. 27a (quoting *Western Maryland Railroad v. System Board of Adjustment*, 465 F. Supp. 963, 975 (D. Md. 1979)), and after recognizing "that it is somewhat anomalous that secondary picketing is allowed by *Burlington Northern*, but considerably undercut in its effectiveness by the type of injunction entered here", App. 27a, proceeded to "undercut" this Court's *Burlington Northern* decision in just that anomalous way.

The court of appeals did so even though that court could *not* point to a decision of this Court requiring that result but only to its own far from self-evident reading of RLA § 2 First. We submit that the courts of appeals are not free, in divining the answers to open legal questions, to show such a cavalier disregard for this Court's precedents.

1(a). The court of appeals candidly recognized that there is a circuit conflict as to whether the RLA's "minor dispute" provisions—which mandate the arbitration of disputes over whether there has been a breach of a collective bargaining agreement—empower the federal courts to enjoin sympathy strikes alleged to be in breach of contract. That court's succinct articulation of the state of

the lower court law fairly summarizes the conflicting decisions:

> The Unions contend . . . that the sympathy strike which they propose is not a 'dispute' between the Unions and the Railroads, and therefore is not subject to the resolution procedures of the RLA. Their claim is not without case support. *See Eastern Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, No. 89-5229 (11th Cir. March 24, 1989) ('[o]rdinarily, it is lawful to honor picket lines, and the RLA does not unambiguously preclude sympathy strikes')[3]; *Brotherhood of Locomotive Firemen & Enginemen v. Florida East Coast Ry. Co.*, 346 F.2d 673, 675-76 (5th Cir. 1965) (sympathy strike treated as part of provoking major dispute which had reached stage of permissible self-help); *Arthur v. United Air Lines, Inc.*, 655 F.Supp. 363, 367 (D. Colo. 1987) (unlawful under RLA to terminate non-union employees who sympathy strike absent evidence that terminations necessary to prevent disruption of vital transportation services); *Western Maryland R.R. Co. v. System Bd. of Adjustment*, 465 F.Supp. 963, 975 (D. Md. 1979) (sympathy strike not enjoinable under RLA); *Northwest Airlines, Inc. v. Transport Workers Union*, 190 F.Supp. 495, 498 (W.D. Wash. 1961) (sympathy strike treated as aspect of another union's major dispute).
>
> Other courts, however, have held that a sympathy strike presents a dispute subject to RLA resolution procedures, and is accordingly enjoinable. *See Trans Int'l Airlines, Inc. v. International Bhd. of Teamsters*, 650 F.2d 949 (9th Cir. 1980) (sympathy strike by employees subject to 'no strike' clause enjoined under RLA pending determination of contractual rights pursuant to minor dispute resolution procedures), *cert. denied*, 449 U.S. 1110, 101 S.Ct. 918, 66 L.Ed.2d 839 (1981); *Northwest Airlines, Inc. v.*

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[3] The Eleventh Circuit's opinion in *Eastern Air Lines v. Air Line Pilots Association, International*, No. 89-5229 (11th Cir. Mar. 24, 1989), is reprinted at App. 93a-95a.

> *Air Line Pilots Ass'n, Int'l*, 442 F.2d 246 (8th Cir. 1970), *aff'd on rehearing*, 442 F.2d 251 (8th Cir.) (sympathy strike enjoinable under minor dispute resolution procedures of RLA notwithstanding absence of 'no strike' clause, because contract may arguably be interpreted as implicitly prohibiting honoring of picket lines), *cert. denied*, 404 U.S. 871, 92 S.Ct. 70, 30 L.Ed.2d 116 (1971); *Chicago & Illinois Midland Ry. Co. v. Brotherhood of R.R. Trainmen*, 315 F.2d 771 (7th Cir.) (sympathy strike enjoinable where no effort made to comply with minor dispute resolution procedures of RLA), *vacated as moot*, 375 U.S. 18, 84 S.Ct. 61, 11 L.Ed.2d 39 (1963); *Northwest Airlines, Inc. v. International Association of Machinists*, —— F.Supp. —— (D.Minn. 1989) (sympathy strike enjoinable under RLA where collective bargaining agreement includes 'no strike' clause); *International Ass'n of Machinists v. Airline Indus. Relations Conf.*, Civ. 89-0514 (D.D.C. March 16, 1989) (same); *Southeastern Pa. Transp. Auth. v. International Ass'n of Machinists*, 708 F.Supp. 659 (E.D. Pa. 1989) (same); *Trans World Airlines v. International Ass'n of Machinists*, 629 F.Supp. 1554 (W.D. Mo. 1986) (same). [App. 22a-24a]

To make the foregoing complete, we add that the Third Circuit subsequently aligned itself with the court below by affirming the *Southeastern Pa. Transp. Auth.* district court decision cited above. *See Southeastern Pennsylvania Transportation Authority v. International Association of Machinists and Aerospace Workers*, 1989 U.S. App. LEXIS 11990, No. 89-1174 (3d Cir. Aug. 14, 1989).

In sum, the RLA law in the Eleventh and Fifth Circuits—like the National Labor Relations Act law declared by this Court in *Buffalo Forge v. Steelworkers*, 428 U.S. 397 (1976)—is that nothing in the applicable federal collective bargaining statutes overrides the Norris-LaGuardia Act and that the federal courts therefore do not have the authority to enjoin sympathy strikes alleged to be in breach of contract. The RLA law in the Second Circuit—

and in the courts of appeals aligned with the court below —is that "the major purpose of the passage of the RLA was to prevent strikes in the transportation industries subject to its governance," App. 26a, and that this asserted RLA purpose overrides Norris-LaGuardia and justifies the federal court injunctions issued here.

(b). The court of appeals sought to buttress its side of this circuit conflict by suggesting that the decision below flows *a fortiori* from this Court's decision in *Trainmen v. Chicago R. & I. R. Co.*, 353 U.S. 30 (1957) (*"Chicago River"*). App. 22a. The question decided in *Chicago River* is, however, entirely separate from the question presented here.

Chicago River addressed the lawfulness of a strike in response to carrier action where *that carrier action* is alleged to be in breach of the applicable collective bargaining agreement. Without submitting the contract dispute to RLA arbitration—where an expert arbitrator would determine whether the carrier's action was consistent with the contract—the union in *Chicago River* sought to get its way by resorting to economic self-help to pressure the carrier to accept the union's contract interpretation. An exception to the Norris-LaGuardia Act was warranted, the *Chicago River* Court reasoned, because by virtue of the mandatory arbitration provisions of the RLA "[s]uch controversies . . . are not the same as those in which the injunction strips labor of its primary weapon without substituting any reasonable alternative." 353 U.S. at 41.

In this case, by contrast, it is the *unions* that stand in the position of the *Chicago River* employer. The unions are alleged to be acting in violation of their contractual obligation to report to work and it is the carriers who are seeking to get their way without demonstrating to an arbitrator's satisfaction that the unions' action does in fact violate the contract. And in this case, unlike *Chicago River*, the injunction clearly does "strip[] labor of its

primary weapon without substituting any reasonable alternative."

In short, the availability of an RLA status quo injunction directed against an alleged breach of contract pending arbitration of the contract claim was not an issue presented in *Chicago River* and has never been addressed by this Court. Thus, whatever the governing rule in this case is determined to be, that rule will not be derived by implication from *Chicago River*. *Cf. Buffalo Forge*, 428 U.S. at 404-11 (distinguishing, for purposes of the National Labor Relations Act, strikes over an arbitrable dispute and sympathy strikes which have "neither the purpose nor the effect of denying or evading an obligation to arbitrate," *id.* at 408).

2. The court of appeals treated it as too plain for doubt that if the collective bargaining agreements were "reasonably susceptible" to the railroads' interpretation, the federal courts have authority to enter the requested injunctions. After reviewing the district court's basis for concluding that the railroads have a colorable breach of contract claim, App. 25a-26a, the court of appeals stated: "We agree. Consequently, the disputes are arbitrable and the preliminary injunctions were properly entered." App. 26a.[4] The Fifth and Eighth Circuits take essentially the same position. *International Association of Machinists and Aerospace Workers v. Frontier Airlines*, 664 F.2d 538, 542 (5th Cir. 1981) ("injunctions may issue to prevent the carrier from disrupting the status quo when doing so would result in irreparable injury"); *United Transportation Union v. Burlington Northern, Inc.*, 458 F.2d 354, 357 (8th Cir. 1972) (a

[4] *See also International Association of Machinists and Aerospace Workers v. Eastern Air Lines*, 847 F.2d 1014, 1017 (2d Cir. 1988) (affirming minor dispute status quo injunction); *Westchester Lodge 2186 v. Railway Express Agency, Inc.*, 329 F.2d 748, 753 (2d Cir. 1964) (federal court can issue injunction "to restore the *status quo* in a minor dispute if the court's discretion is soundly exercised to preserve the primary jurisdiction of the Adjustment Board").

breach of contract injunction may issue "upon an equitable showing of irreparable injury").

The District of Columbia and First Circuits reject the positions of the foregoing courts. As the D.C. Circuit stated in terms that could not be clearer: "the arbitration board's jurisdiction over minor disputes is exclusive; *the courts do not have jurisdiction to issue status quo injunctions.*" *Air Line Pilots Association, International v. Eastern Air Lines*, 863 F.2d 891, 895-96 (D.C. Cir. 1988) (emphasis added). *Accord International Association of Machinists and Aerospace Workers v. Eastern Air Lines*, 826 F.2d 1141 (1st Cir. 1987).[5]

Just last term the Court "decline[d] to resolve the question whether a status quo injunction based on a claim of irreparable injury would be appropriate" in a minor dispute because the union in that case did not base "its claim for injunctive relief on an allegation of irreparable injury". *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 109 S.Ct. 2477, 2481 & n.5 (1989). *See also Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad*, 363 U.S. 528, 531 n.3 (1960) (also declining to reach this question).

The longstanding conflict in the courts of appeals on this important issue, like the conflict detailed in point one above, requires this Court's consideration and resolution.[6]

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[5] The state of the lower court law is so confused that the First Circuit claimed to find support for its view in decisions of the Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh and D.C. Circuits, all of which, the First Circuit said, had "rejected" the Second Circuit's view. *See IAM v. Eastern Air Lines*, 826 F.2d at 1151 (collecting cases).

For present purposes it suffices to say that the Second Circuit position, on the one hand, and the D.C. Circuit and First Circuit position, on the other, cannot be reconciled.

[6] As a matter of pure logic, the sympathy strike injunction question discussed in point one is a particular instance of the RLA minor dispute status quo injunction question discussed in point

3. We began by stating that the court of appeals' decision is based on the same "self-mesmerized views of economic and social theory", *Jacksonville Terminal Co.*, 394 U.S. at 382, that generated the *Duplex Printing* decision. We conclude by returning to that point. The parallel is most clearly evident in the court of appeals' irreparable injury discussion. *See* App. 29a-30a. So far as the court below could see, the only employee interest at stake here is that of the petitioner rail unions in "expressing solidarity with another union by honoring its picket line." App. 29a.[7] Given its blindness, the court "[saw] no reason why a union should be accorded greater rights to engage in a sympathy strike to apply pressure against *another* employer than it has to engage in a primary strike against the employer of its own members." App. 28a (emphasis in original).

The facile equation of this case with a *Chicago River* case totally ignores the true interests at stake. Under *Chicago River* the injunction against self-help is both in form and *in substance* directed at a party to a contract who has no right to engage in self-help over a contract interpretation dispute (and who does have a right to an

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two in the sense that a negative answer to the latter question entails a negative answer to the former.

We distinguish between these two questions because the court below framed—and analyzed—the question here as a strike injunction question and we do not wish to open ourselves to the counter argument that we have mischaracterized the court of appeals' position or have failed to meet that court on its chosen ground. Moreover, it is far from clear that all the lower courts equate employer requests for status quo injunctions against sympathy strikes with union requests for status quo injunctions against alleged employer contract breaches.

[7] It is instructive to compare the court of appeals' summary dismissal of the critical employee interests in honoring picket lines with Judge Hand's thoughtful explication of those same employee interests in *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-06 (2d Cir. 1942) (L. Hand, J.).

arbitral resolution of his breach of contract claim). Here, by contrast, while in form the injunction is against the petitioner unions, which are parties to collective bargaining agreements with the respondent railroads, in substance the injunction is against *the employees of Eastern Air Lines represented by the IAM*, who have exhausted the Railway Labor Act collective bargaining procedures and who have a right to engage in meaningful self-help.

The court of appeals does not even acknowledge the Eastern employees' rights and interests. Not surprisingly, then, its decision substitutes for the RLA's guarantee to those employees of the full-blooded right to picket, as that right has traditionally been understood, an enfeebled "right" to publicize a labor dispute to members of the general traveling public. *See* App. 27a n.4.

In this regard the decision below cannot be squared with this Court's *Burlington Northern* and *TWA v. IFFA* decisions. As the Court emphasized in the latter case, the RLA provides "greater avenues of self-help" to primary disputants than does the NLRA. 109 S.Ct. at 1233. Among these, as *Burlington Northern* held, is the right of employees engaged in a primary collective bargaining dispute to take part in secondary self-help activity that means something, *i.e.*, secondary activity generating economic pressure that "creat[es] an incentive for the [primary] parties to settle." 481 U.S. at 451-52.

The court of appeals compounded this error by treating this case as one in which it is sufficient for the party alleging a contract breach to show that the applicable collective bargaining agreement is reasonably susceptible to being read as a waiver of the covered employees' right to honor a lawful picket line. *See* App. 25a-26a. *Compare Consolidated Rail Corp. v. Railway Labor Executives' Association*, 109 S.Ct. at 2482. In the Railway Labor Act context, as in the National Labor Relations

Act context, the proper rule is that a contractual waiver of this basic statutory right "must be clear and unmistakable," *Local Union 1395, IBEW v. NLRB*, 797 F.2d 1027, 1029 (D.C. Cir. 1986) (*quoting Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)).

Under the court of appeals' approach, as we have shown, the RLA's minor dispute procedures become the means for undermining the Act's major dispute procedures. The clear and unmistakable waiver rule, in contrast, prevents employers from manipulating the minor dispute procedures to frustrate the right of employees engaged in a major dispute to employ the "full range of whatever peaceful economic power [those employees] can muster," *TWA v. IFFA*, 109 S.Ct. 1235 (*quoting Jacksonville Terminal Co.*, 394 U.S. at 392).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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